Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF GALAXY COMMUNICATIONS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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February 9, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF AMICUS CURIAE

Galaxy Communications, Inc. is an applicant before the Federal Communications Commission for a construction permit for a new FM radio broadcast station in Selbyville, Delaware. Its application was recently denied by an FCC Administrative Law Judge in deference to an applicant whose principals are minorities. *Anchor Broadcasting Limited Partnership*, 4 FCC Rcd 5687 (1989). On three of the four comparative factors at play in the case, Galaxy surpassed the winning applicant. But for the minority composition of the competitor, Galaxy would have prevailed. Galaxy has appealed the denial of its

application to the FCC's Review Board. Accordingly, Galaxy has a significant interest in the outcome of this Court's review of the FCC's minority preference policy.[1]

Galaxy will confine its discussion herein to the FCC's preference policy only as it relates to an applicant's race or ethnicity in the context of the Commission's comparative licensing procedures. We do not address the constitutionality of the female preference policy which, in our view, turns on related but separate issues.

SUMMARY OF ARGUMENT

The history and framework of the FCC's comparative licensing scheme is outlined in detail in Petitioner's brief. Our references herein to the Commission's licensing procedures should be read in the context of that discussion.

Galaxy will focus on one aspect of the FCC's rationale for treating minority and ethnic applicants preferentially, *i.e.*, the "program diversity" theory. The rationale for awarding minority preferences to achieve program diversity in the broadcasting industry will not withstand strict scrutiny. In the very limited setting of an educational institution, "diversity" may serve a defensible government interest. However, crucial dissimilarities between diversity in academia and in broadcast programming undermine the argument that First Amendment considerations, in and of themselves, elevate diversity in programming to the status of a compelling government interest. Moreover, other means are available to foster diverse programming views. Finally, in any event, the minority preference policy is not narrowly tailored to achieve its asserted objective.

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[1] Pursuant to Rule 36.2 of the United States Supreme Court, this brief is filed with the consent of Petitioner and Respondents. Copies of the letters of consent are being filed herewith.

ARGUMENT

THE FCC'S MINORITY PREFERENCE POLICY VIOLATES THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION

Classifications which are based on racial or ethnic distinctions are inherently suspect. *Korematsu v. United States*, 323 U.S. 214 (1944). The Supreme Court has "consistently repudiated distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality." *Loving v. Virginia*, 388 U.S. 1, 11 (1967), *quoting Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

A broadcast license, a job, a seat in a medical school class, or other benefits in short supply given to some on the basis of their race must be taken from others on the basis of their race. No racial distributions, whatever their alleged objective, can be "benign." *City of Richmond v. J. A. Croson Co.*, 109 S.Ct. 706, 721 (1989). Therefore, any use of racial classifications must be subject to strict scrutiny and cannot be ". . . dependent on the race of those burdened or benefited by a particular classification." *Croson*, 109 S.Ct. at 721, *citing Wygant v. Jackson Board of Education*, 476 U.S. 267, 279-80 (1986).

The purpose of strict scrutiny is to discern illegitimate uses of race by ensuring that the government is pursuing a goal important enough to warrant use of a highly suspect tool. *See Croson*, 109 S.Ct. at 721. As Justice O'Connor has recognized, the test "ensures that the means chosen 'fit' [a] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.*

Therefore, it is not sufficient justification for the use of racial categories that they are possible devices to

achieve worthwhile ends or that there is some rational basis for their use. Rather, for a racial classification to withstand strict scrutiny, two exacting conditions must be satisfied. First, the means chosen must be necessary to achieve a compelling government interest. *Wygant*, 476 U.S. at 274; *Croson*, 109 S.Ct. at 721. Second, the racial classification must be narrowly tailored to achieve the compelling interest. *Id.* As demonstrated below, the FCC's minority preference policy satisfies neither of these conditions.

I. THE FCC'S MINORITY PREFERENCE POLICY IS NOT NECESSARY TO ACHIEVE A COMPELLING GOVERNMENT INTEREST

As outlined in detail in Petitioner's brief, the FCC's minority preference policy had its origin in *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) and in *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975). In *TV 9*, the District of Columbia Circuit held that merit should be awarded in licensing contests "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, ..." *TV 9*, 495 F.2d at 938. Subsequently in *Garrett*, the same circuit determined that "Black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of Black citizenry. . . ." *Garrett*, 513 F.2d 1062. The *Garrett* court rejected the FCC's view that a credit for racial preference should be awarded only where an applicant demonstrates a nexus between race and increased program diversity. Instead, the court created an *a priori* and irrebuttable presumption that minority ownership and management will promote program diversity. *Id.* at 1063. Pursuant to these rulings, the FCC incorporated minority and ethnic preferences into its comparative licensing scheme. *See generally WPIX, Inc.*, 68 FCC 2d 381 (1978); *and Radio Jonesboro, Inc.*, 100 FCC 2d 941 (1985). Today, the presumption that minority ownership will result in program diversity constitutes the theoretical core of the FCC's minority preference policy. Evocative as the diversity goal may be, however, it cannot justify the use of racial and ethnic criteria in the selection of broadcast licensees.

A. Program Diversity Is Not A Compelling Government Interest

In upholding the FCC's minority preference policy, the District of Columbia Circuit ruled in *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), that the issue of the policy's constitutionality is controlled by the same circuit's previous decision in *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). The court in *West Michigan* held that the FCC's minority preference policy, as an instrument for program diversity, served a legitimate government interest and was therefore constitutional. *Id.* at 613. The court reached this decision by analogizing the FCC's goal of diversity in broadcasting to the goal of academic diversity, validated as a compelling government interest in *University of California Regents v. Bakke*, 438 U.S. 265 (1978). As will be demonstrated below, the analogical argument is strained, not because there is no analogy between the two cases, but because the differences are more significant than the similarities. While achieving diversity in an educational setting may be sufficiently compelling, the FCC's goal of diversity in programming through the use of race-specific criteria is not.

In *Bakke*, Justice Powell approved of an educational institution's use of race as one factor among many to attain the laudable goal of a diverse student body. The First Amendment provides the constitutional predicate. In this way, students are exposed to the "atmosphere of 'speculation, experiment and creation'—so essential to the

quality of higher education—[that] is widely believed to be promised by a diverse student body." *Id.* at 312.

In *Bakke*, race was found to be acceptable for consideration by admissions officers in universities, but only as one consideration in that process, and only when the factor of diversity made a telling difference. *Id.* at 314. Indeed, for four of the Justices in that case, the constitutional issue was not even properly reached, the matter being plainly determinable on the basis of Title VI which, in the plainest language, categorically forbids favor on the basis of race. *Id.* at 281-82; Civil Rights Act of 1964, as amended, § 2000d.

In *Bakke*, Justice Powell flatly and forcefully rejected the use of race for the purposes of achieving proportionality. *Id.* at 304. "Preferring members of any one group for no other reason than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 309. It was only because of the unique place of the university, engaged so centrally in the "robust exchange of ideas," that First Amendment considerations became relevant. *Id.* at 312. That unique role of the university alone motivated Justice Powell to regard diversity as a sufficiently compelling government interest. *Id.* at 312-15.

The court in *West Michigan* seized upon Justice Powell's acceptance of diversity as a compelling government interest and inappropriately applied it to the broadcast context. *West Michigan*, 735 F.2d at 614. Academic diversity was likened to the FCC's "goal of attaining diverse programming on the First Amendment value 'that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" *Id.* at 614, *citing Associated Press v. United States*, 326 U.S. 1, 20 (1945).

This line of reasoning fails because there are fundamental differences between the academic and broadcast

settings. First, under Justice Powell's rationale, it is not diversity in itself that justifies the use of race in giving a preference; it is diversity in the discussion of ideas in the context of a university education. Further, diversity is significant only when, absent a minority preference, there would not be a sufficient number of minorities present to bring to their classmates the variety of points of view that their education requires. *Bakke*, 438 U.S. at 312.

The crucial fact in the academic diversity rationale is that non-minority students, interacting and freely exchanging ideas with minority students, will associate diverse opinions with their advocates—the minority speakers. In this way, racial stereotypes are broken down. Thus, the racial or ethnic diversity of those present has, in some contexts, a teaching function.

Diversity in broadcast programming is wholly distinguishable. A radio or television station audience cannot "see," as the students can, the proponents of the ideas which the station disseminates. Diverse views expressed in editorials and in the presentation of news almost never reflect the race or ethnicity of the licensee. A minority-owned station's news, editorials and public affairs programming cannot be said to break down racial prejudices in the sense envisaged by Justice Powell in *Bakke*. Nor can there be a credible argument that, absent the minority preference, the public will be done a constitutional injury under the First Amendment.

Moreover, if Justice Powell's rationale in *Bakke* is to be transferred to the broadcast setting, it will be necessary to reconsider what he meant when he said that minority status (to be appropriately considered) would have to be one of a number of factors weighed. *Bakke*, 438 U.S. at 314. His point was that the university's goal must honestly be that of achieving diversity of opinion and ideas and not that of merely increasing the number of minorities. *Id.* at 314. Justice Powell reasoned

that good faith in pursuing this objective would be found only if the university also sought persons of different economic status, different geographical backgrounds, different ages, etc. *Id.* at 315. These additional factors go to the question of diversity.

The FCC's minority preference policy, however, does not operate this way. The only factors considered in determining an applicant's diversity are race, ethnicity or gender. The other factors for which qualitative enhancements are given—local residence, civic involvement, past broadcast experience—go not to the applicant's diversity but to his or her ability to operate a broadcast facility in the public interest. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), *recon. denied*, 1 FCC 2d 918.

Indeed, the FCC's attention to these other enhancement factors strongly suggests that, except for minority status, ethnicity or gender, no other "diversity" factors are weighed, and even non-diversity factors are weighed positively in the comparative balance. This is starkly different from the university context. If, in the university, admissions officers considered only performance, character, exam results—*and race*—race would plainly not be one among a variety of "diversity" factors. Yet, that is precisely the infrastructure of the FCC's minority preference policy. Because various enhancement factors are used in the comparative contest, they are erringly perceived as different diversity factors. In short, the word "diversity" is unwittingly used duplicitously in the two contexts.

B. The FCC's Minority Preference Policy Is Not A Necessary Means Of Achieving The Goal Of Program Diversity Because Other Race-Neutral Alternatives Exist

A majority of the Court in *Croson* forcefully reiterated that race-specific criteria have little chance of surviving

constitutional scrutiny where valid race-neutral alternatives exist for achieving the same goals. *Croson*, 109 S.Ct. at 728. Justice O'Connor was critical of the drafters of the minority business set-aside plan at issue in *Croson* for not considering the "use of race-neutral means to increase minority business participation in city contracting." *Id.* She noted that the principal opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), determined that Congress had carefully examined and rejected race-neutral alternatives before enacting the minority business set-aside program. *Croson*, 109 S.Ct. at 728.

In the broadcasting industry, program diversity is assured through many factors other than minority ownership preferences. As a practical matter, the most potent factors affecting program content are market forces—the commercial pressures that competition imposes upon station licensees. It is one of the theoretical underpinnings of the FCC's deregulatory philosophy that the "invisible hand" of the marketplace will ensure the variety of viewpoints which is the asserted goal of the minority preference policy.

If market forces were not sufficient by themselves, however, there are other means by which the FCC engenders program diversity without involving race or ethnicity. These approaches focus instead on the responsibility of licensees as stewards of a public trust to air programming that is diverse and responsive to the citizenry.

For instance, for many years the FCC required new broadcast station and license renewal applicants to conduct extensive ascertainment studies. *See, e.g., Amendment to the Primers on Ascertainment of Community Problems by Commercial Broadcast Renewal Applicants and Noncommercial Educational Broadcast Applicants, Permittees and Licensees*, FCC 80-134 (released April 4, 1980). These surveys were intended to give existing or aspiring licensees an understanding of the needs and in-

terests of a variety of significant groups within the licensee's community, including minority and ethnic groups. *Id.* at 2. A station's programming was expected to reflect a sensitivity to the diverse concerns of such groups. *See, e.g., Mississippi Authority for Educational Television*, 79 FCC 2d 577 (1980).

The formal ascertainment requirement was repealed in the wake of the deregulation movement of the early 1980s. However, the underlying policy remains in effect in the FCC's regulations. Licensees are still required to maintain a list, updated quarterly, of the most significant needs and interests found in the community, together with a list of the programs they broadcast to address those concerns. *See* 47 C.F.R. § 3526(a)(8) (1988); *see also Third Further Notice of Inquiry and Notice of Proposed Rule Making*, FCC 89-109 (released August 16, 1989) ("The 'issues/programs' list is a significant and representative indication that a licensee is providing substantial service to meet the needs and interests of its community.").

Likewise, in the context of comparative licensing proceedings, a means to achieve programming diversity in a race-neutral way already exists. The comparative criteria provide that any applicant has the opportunity to make a claim for a comparative enhancement on the basis of a "specialized programming format" proposal. *Policy Statement*, 1 FCC 2d 393 (1965). *See also West Michigan*, 735 F.2d at 605. Under this provision, if an applicant can show that the programming he proposes is not available in a substantial amount in the marketplace, he gains a comparative enhancement. *See, e.g., Religious Broadcasting Network*, 3 FCC Rcd 4085 (Rev. Bd. 1985), *recon. granted in part, remanded*, 3 FCC Rcd 6216 (Rev. Bd. 1988). This incentive motivates applicants irrespective of their race or ethnicity.

Under any of these approaches, diversity is enhanced as the needs and interests of members of various ethnic

or minority groups in the community are reflected in the licensee's programming. This is achieved without consideration of the race or ethnicity of the station owner.

II. THE MINORITY PREFERENCE POLICY IS NOT NARROWLY TAILORED TO ACHIEVE THE GOAL OF PROGRAM DIVERSITY

Let us assume, *arguendo*, that the government's interest in diversity in broadcast programming is sufficiently compelling to justify the use of race-specific criteria. Nevertheless, the premise that "diverse programming" will necessarily flow from the fact of minority or ethnic ownership, *see Garrett*, 513 F.2d 1056, is hopelessly problematic. The idea simply cannot be translated into the practical tool needed to fashion a narrowly tailored result. As noted by Justice Powell in *Wygant*, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Wygant*, 476 U.S. at 280, *citing Fullilove*, 448 U.S. at 537.

This difficulty manifests itself in at least two ways. First, defining ethnic or minority programming is virtually impossible and, in any case, would propagate rather than dispel ugly stereotypes. Second, there is no evidence to support the *Garrett* court's *a priori* presumption that station owners who are members of an ethnic or minority group will broadcast points of view that are "diverse" in any sense that can be correlated with their ethnic or minority status. Galaxy submits that neither of these difficulties can be addressed with the degree of precision required by the "narrowly tailored" test.

A broadcast station's "programming" is ordinarily understood to include two categories: entertainment and non-entertainment programming (*i.e.*, news, public affairs, etc.). Under the *TV 9* line of cases, the First Amendment benefits thought to be gained by the minority

preference scheme relate to the presentation of news and editorials, rather than to entertainment programming (*e.g.*, music, situation comedies, etc.). Accordingly, the program diversity rationale assumes (a) that there is a meaningful connection between one's ethnic group or race and one's point of view; and (b) that the perspectives characteristic of an owner's ethnicity or race will necessarily be reflected in a station's news and editorials. These assumptions are invalid.

First, one must engage in the most repugnant form of stereotyping even to posit that there are political views that a minority person has that are characteristic of his race. One's political and social views are the result of innumerable and largely unquantifiable influences of which racial background is only one. A connection so tenuous as this—between the color of one's skin and the bent of one's politics—should never have been accorded the axiomatic status it achieved in *TV 9* and *Garrett*, and which was ratified in *West Michigan*. Since such a correlation never could be established, the assumption must be rejected.

Moreover, even if race or culture were a measurable factor in a licensee's outlook so as arguably to have some influence on the points of view the station disseminates, there is a much more significant factor influencing programming decisions. Minority broadcasters, like all broadcasters, operate within the confines of the marketplace. To succeed, they must be willing to respond to market demands which may or may not accommodate particular points of view or program formats.

It is this dynamic between the broadcaster and his audience which shapes his programming policies, with minimal involvement by the FCC. To our knowledge, the FCC has never attempted to set forth a definition, or even to characterize, for example, "Black" or "American Indian" programming. Indeed, to do so would be to engage in ethnic and racial stereotyping, and only perpet-

uate images which any legitimate form of affirmative action is intended to break down forever.

In sum, the minority preference policy cannot be narrowly tailored to achieve program diversity. The concept of "minority programming" is inherently vague and, what is worse, employs the lingering ethnic and racial stereotpyes which a constitutionally valid plan must avoid.

CONCLUSION

For the foregoing reasons, the judgment of the court in *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989), insofar as it affirmed the constitutionality of the FCC's minority preference policy, should be reversed.

Respectfully submitted,

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